TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]5

No. [illegible]54

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

GIUSEPPE ERICO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Supreme Court of the United States

OCTOBER TERM, 1965

No. 898

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

vs.

GIUSEPPE ERRICO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

[fol. 1]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of

GIUSEPPE ERRICO, Respondent.

9-27-63

I certify that on this date I read and explained the entire contents of this document to the respondent in the Italian language, and that he stated he understood.

/s/ Mary Colasuonno
MARY COLASUONNO
Interpreter

File No. A-11 925 754

ORDER TO SHOW CAUSE AND NOTICE OF HEARING—
September 11, 1963

TO: GIUSEPPE ERRICO
(name)

1808 S. E. Clinton Street
(address)

Portland, Oregon

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Italy and a citizen of Italy;

3. You last entered the United States at New York, N.Y., on or about October 17, 1959;
(date)

4. You were admitted to the United States as a first preference quota immigrant based upon a visa petition submitted by West Slope Motors, Portland, Oregon;

5. The visa petition was approved on June 18, 1959, upon the presentation of affidavits from Italy alleging that you were a person of specialized experience as a specialized mechanic and tune-up man on motors produced in Italy;

6. You were not a specialized mechanic and tune-up man as alleged.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

> Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are not of the proper status under the quota specified in the immigrant visa, under Section 211 (a)(4) of the Act.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at Room 322, U. S. Court House, Portland, Oregon, on September 27, 1963, at 1:00 p.m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: September 11, 1963

IMMIGRATION AND NATURALIZATION SERVICE

/s/ Alfred J. Urbano
ALFRED J. URBANO, District Director
(signature and title of issuing officer)
Portland, Iregon
(City and State)

[fol. 2]

BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE

File: A11-925-754—Portland, Oregon

IN DEPORTATION PROCEEDINGS

In The Matter Of

GIUSEPPE ERRICO, RESPONDENT

CHARGES:

I & N Act—Section 241(a)(1)—Excludable at entry under Section 211(a)(4)—Not of proper status under quota specified in the immigrant visa.

APPLICATION: Waiver of excludability, Section 211(c), I & N Act.

IN BEHALF OF RESPONDENT:

Frank M. Ierulli, Attorney
708 Equitable Building
Portland, Oregon

IN BEHALF OF SERVICE:

B. G. Greenwald
Trial Attorney
Seattle, Wash.

DECISION OF THE SPECIAL INQUIRY OFFICER—
January 31, 1964

The respondent is a 29 year old married male. He admits, as alleged in the order to show cause, that he is a native and citizen of Italy who entered the United States at New York, N.Y., October 17, 1959, as a selected immigrant under the first preference of the Italian immigration quota, whose status as such was based on a visa peti-

tion submitted by the West Slope Motors, Portland, Oregon, approved June 18, 1959 after presentation of affidavits from Italy representing that he was a specialized mechanic and motor tune-up man on motors produced in Italy. He denied the allegation that he was not a specialized mechanic and tune-up man as claimed.

[fol. 3] The respondent's right to admission at the time of his arrival in the United States depended upon his qualification for preference quota status under the provisions of Section 203(a)(1)(A) as a quota immigrant whose services are determined by the Attorney General to be needed urgently in the United States because of .... technical training, specialized experience or exceptional ability .... substantially beneficial prosectively to the national economy .... of the United States. Those not entitled to such classification are inadmissible.[1] This is so whether the government was misled in granting the status or not.[2] Those who succeed in gaining entry are deportable under the provisions of Section 241(a)(1) of the Act.

The issue of fact raised by the charge and the pleading is whether the respondent was in fact a specialized mechanic and motor tune-up man on motors produced in Italy. The respondent by his own admissions established that he was, with the exception of his army service in Italy, a farmer by occupation, engaged in running the family farm. There was no machinery or tractors on this farm and the family did not have a car. The respondent, prior to coming to the United States, worked without pay at a garage in Italy part time for a few months. There is abundant evidence from the employer he was destined to work for in the United States (Ex. 12), the testimony of members of his family and his own testimony, prior to (Ex. 5) and during the hearing (Tr., p. 66), that he was not a specialized mechanic and motor tune-up man on motors produced in Italy. The evidence disclosed that he never became more than an unpaid apprentice in a small garage for a short period of time, never having worked as

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[1] Section 205(d), and Section 211(a)(4), I & N Act.

[2] *Matter of T-*, 8 I & N Dec. 500 (12-10-59).

[fol. 4] a qualified mechanic, much less as a specialist on various motors made in Italy. It is clear from the evidence that the respondent was not entitled to admission to the United States October 17, 1959 at New York, N.Y., and is therefore deportable on the charge in the order to show cause. The respondent designated Italy as the country of his choice in the event he is deported from the United States.

The respondent applied for relief from deportation under the authority contained in Sections 211(c) and (d) of the Immigration and Nationality Act of 1952, which provides in pertinent part as follows: "The Attorney General may in his discretion . . . . admit to the United States any otherwise admissible immigrant not admissible under clause . . . .(4) of subsection (a), if satisfied that such inadmissibility was not known and could not have been ascertained by the exercise of reasonable diligence by such immigrant prior to the departure of the vessel or aircraft from the last port outside the United States . . . . prior to the application of the immigrant for admission".

The October 17, 1959 entry was the respondent's only entry into the United States. He has lived continuously in Portland, Oregon since that time. On October 26, 1959 he commenced work at the West Slope Motors, Inc., the company that petitioned to bring him to the United States as a first preference immigrant. He remained there three months and, as the record discloses, he failed to measure up to the requirements of a specialized mechanic. On August 29, 1960 he was employed by the Victory Plating Works, Inc., Portland, Oregon, where he has since been continuously working. The respondent's wife resides with him in Portland, Oregon. She accompanied him to the United States in October 1959. They have one child, born in Portland, Oregon on August 3, 1960.

[fol. 5] In addition to his wife and child, the respondent's entire family resides in the United States. He is the eldest of six children. His parents and all his brothers and sisters reside in the United States. With the exception of one aunt, all of his close relatives reside here.

The respondent's mother, wife, brother, and sister testified at the hearing. They told of the respondent's early background in Italy and spoke with candor concerning his qualifications, especially as a mechanic. It was pointed out that the respondent, as the eldest son in the family, took the place of the father as the head of the family and ran the family farm in Italy while the respondent's father was absent in Argentina. They appear to be an unusually devoted family and, as is understandable, were deeply concerned about the welfare of the respondent and his family.

There was introduced into evidence two complaints filed in the Municipal Court for the City of Portland, Oregon, on April 17 and 26, 1963, charging the respondent with the commission of a disorderly act and disturbance of the peace by lewdly exposing the private parts of his person March 15, 1963 and April 16, 1963. The latter complaint, although filed under the same ordinance, charged that the exposure was to a female child. The Municipal Court, on June 20, 1963, found the respondent guilty of the April 16th offense and sentenced him to imprisonment in the City Jail for a period of one hundred eighty days, suspending the sentence on the condition that he receive psychiatric treatment and that his attorney see that the doctor's progress report would reach the court after the expiration of sixty and one hundred eighty days. It appears that the court subsequently amended its judgment to merely provide that after a plea of not guilty, [fol. 6] that the said case be continued for one hundred eighty days. The testimony of the attending psychiatrist was heard. He testified that the respondent had a neurosis precipitated by feelings of inadequacy and insecurity produced by stress in adjusting to his new environment. The doctor testified that he was responding well to treatment, and that he felt the condition was controlled and should not recur.

On September 5, 1961 the respondent made a sworn statement before an investigator of the Immigration and Naturalization Service at Portland, Oregon. The statement was made through an Italian interpreter, and the respondent's attorney was present. At the time this state-

ment was taken the respondent was unwilling to acknowledge that he was not a specialized mechanic on foreign cars and motors as the government maintained. In a subsequent affidavit made by the respondent February 27, 1962, he acknowledged that he testified falsely on the occasion of the previous statement.

In considering the respondent's application for relief under the provisions of Section 211(c) of the Immigration and Nationality Act, it is unnecessary to determine whether or not the relief should be granted as a matter of discretion because it is clear that he is not eligible for the relief specified in the statute. The statute provides that the relief may be granted only in those cases where the Attorney General is satisfied that the inadmissibility (in the respondent's case, his lack of qualifications as an expert mechanic on foreign motors) was not known and could not have been ascertained by the exercise of reasonable diligence by such immigrant prior to the departure of the vessel or aircraft from the last port outside the United States. It is clear that the respondent in this case [fol. 7] knew of his lack of qualifications prior to his departure and therefore could not qualify for a waiver under Section 211(c) of the Immigration and Nationality Act.

There remains, however, another consideration in this case, and that is whether or not the provisions of Section 241(f) are applicable. It is clear that the visa in this instance was procured by fraud or misrepresentation. The deportation charge, that the respondent is deportable under the provisions of Section 241(a)(1) as an alien who at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry, particularly, Section 212(a)(19), relating to aliens who have procured a visa or other documentation by fraud or by willfully misrepresenting a material fact, was not urged. Section 241(f) provides that "the provisions of this section"—referring to Section 241(a) of the Immigration and Nationality Act—"and to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens *who have procured a visa or other docu-*

mentation, or entry to the United States, by fraud or misrepresentation, shall not apply to an alien *otherwise admissible at the time of entry,* who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence."

The respondent has established the necessary relationship to come within the provisions of Section 241(f). Several questions, however, remain. The first, whether the provisions of Section 241(f) would apply to his case because he is charged with inadmissibility under the provisions of Section 211(a)(4) of the Immigration and Nationality Act relating to aliens who at entry were not of the proper status specified in the immigrant visa, rather than under Section 212(a)(19), aliens who pro- [fol. 8] cured a visa by fraud or willfully misrepresenting a material fact. The Board of Immigration Appeals, in the *Matter of K-*, 9 I & N Dec. 585, 589, March 9, 1962, reaffirmed the previous order in *Matter of S-*, 7 I & N Dec. 715, holding that the section of law under which the deportation charge is laid is immaterial. The Board, in *Matter of K-*, stated:

> "There are, however, other provisions of section 241 (a) which render an alien deportable after entry on charges which flow directly from the entry by fraud or misrepresentation. The two charges set forth in section 241(a)(2) come within this category. Since section 241(f) describes in *general terms* aliens whose documentation or entry was procured by fraud or misrepresentation, we are of the opinion that it was the intent of Congress to save from deportation those aliens who were admissible except for the fact that they had made fraudulent statements regardless of the provision of the statute under which their deportation is sought."

It is concluded that the fact that the charge, excludable at entry for fraud or misrepresentation, is not urged, would not disqualify the respondent from the benefits of Section 241(f).

The next question concerns the language in Section 241(f) which specifies that the benefits of the provision apply only to aliens otherwise admissible at the time of

entry. The respondent was also excludable at the time of admission under the provisions of Section 212(a)(20) because he did not have a valid immigrant visa. Documentary requirements can not be waived unless such waiver is specifically conferred by statute.[3] The statute provides for two types of waivers, a waiver of documents for a returning resident under Section 211(b) of the Immigration and Nationality Act (8 U.S.C. 1181(b)), which does not apply to the respondent's case, and a waiver of certain defects in the visa under the provisions of Section 211(c) (8 U.S.C. 1181(c)), which has been [fol. 9] considered above and found to be inapplicable to the respondent's case. There being no provision for a waiver in the statute, the respondent would not be otherwise admissible as required by the provisions of Section 241(f) and therefore not eligible for the relief from deportation provided in that section, unless that section could be construed to mean that the language of the section implies a waiver where the alien has the requisite relatives in the United States. The Board, in *Matter of K-*, did not go this far. The alien in that case was a returning resident and a waiver was granted under the provisions of Section 211(b). I find that the respondent does not come within the provisions of Section 241(f) of the Immigration and Nationality Act.

Since this case presents a novel question not decided by the Board, it will be certified to the Board for final decision.

ORDER: It is ordered that the respondent be deported from the United States to Italy on the charge contained in the order to show cause.

IT IS FURTHER ORDERED that this case be certified to the Board of Immigration Appeals for review and final decision.

/s/ John W. Keane
JOHN W. KEANE
Special Inquiry Officer

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[3] *Polymeris* v. *Trudell*, 284 U.S. 279, 52 S. Ct. 143, 76 L. Ed. 291 (1932).

[fol. 10] BEFORE THE
BOARD OF IMMIGRATION APPEALS
UNITED STATES DEPARTMENT OF JUSTICE

File: A 11 925 754—Portland, Oregon

In re: GIUSEPPE ERRICO

IN DEPORTATION PROCEEDINGS

CERTIFICATION

IN BEHALF OF RESPONDENT:
Frank M. Ierulli, Esquire
708 Equitable Building
Portland, Oregon

CHARGE

Order: Section 241(a)(1), I&N Act [8 USC 1251 (a)(1)]—Excludable at entry under Section 211(a)(4)—Not of proper status under quota specified in the immigrant visa.

Lodged: None

APPLICATION: Waiver of excludability, Section 211 (c), Immigration and Nationality Act

DECISION—April 20, 1964

In an opinion dated January 31, 1964, the Special Inquiry Officer ordered the deportation of the respondent and certified his opinion to this Board for a final decision.

The respondent is a 29 year old married male alien, native and citizen of Italy who entered the United States on October 17, 1959, under the first preference of the Italian immigrant quota as a specialized mechanic and motor tune-up man on motors produced in Italy. The Order to Show Cause charges that he was excludable at entry under Section 211(a)(4) because he was not of the proper status under the quota specified in the immigrant visa. In finding the charge sustained the Special Inquiry Officer concluded on the basis of the record and

the testimony that the respondent was not in fact a specialized mechanic and motor tune-up man on motors [fol. 11] produced in Italy. Accordingly, he was not eligible under the first preference of the Italian quota. Our review of the record supports this conclusion and it is our belief that the charge contained in the Order to Show Cause is sustained.

The issue presented by the certification of the Special Inquiry Officer is whether the respondent is eligible for and should be granted a waiver of the excluding provisions of Section 211(a)(4) of the Immigration and Nationality Act. The Special Inquiry Officer found that the respondent was clearly not eligible for this relief, inasmuch as the respondent could not possibly show that his inadmissibility as a specialized mechanic was not known to him and could not have been ascertained by the exercise of reasonable diligence prior to his departure for the United States. The Special Inquiry Officer, therefore, inas much as he found the respondent would be statutorily ineligible for such relief did not reach the issue of discretion in the granting of such relief.

The decision of the Special Inquiry Officer considered the applicability of Section 241(f) of the Immigration and Nationality Act. It is his conclusion that the necessary relationship has been established and, further finds that despite the absence of a charge based upon Section 212(a)(19) of the Immigration and Nationality Act, this absence would not disqualify the respondent from the benefits of Section 241(f). He continues in his finding that the respondent was excludable at the time of his admission under Section 212(a)(20) inasmuch as he did not have a valid immigrant visa. Inasmuch as the respondent is ineligible for a waiver of such, the Special Inquiry Officer concludes that Section 241(f) could not apply to him.

The Trial Attorney in a memorandum in support of the decision of the Special Inquiry Officer, urges that Section 241(f) of the Act has no applicability to this case, and that the only issue presented is the respondent's application for a waiver under Section 211(c). He contends if a waiver is not granted the respondent is not "otherwise admissible at the time of entry" and conse-

quently the issue of fraud will not be reached. It is his claim that the fraud involved in the particular circum-
[fol. 12] stances in this case is important only on the issue of eligibility for the waiver in that the respondent has failed to show compliance with the statute. Counsel for respondent in a brief filed before this Board urges that we find the respondent eligible for relief under Section 241(f). He contends that inasmuch as there was no charge lodged against the respondent under Section 212(a)(20) we must conclude the visa issued to the respondent was valid on its face and, therefore, as a matter of law, the respondent is entitled to relief under Section 241(f).

We have carefully reviewed the record in this case. The Trial Attorney has asked us to rule on the propriety of considering the applicability of a waiver under 241(f) in these circumstances. Our approval of the Special Inquiry Officer's decision terminates at the point wherein he has denied the waiver for relief under Section 211(c). Such denial adequately disposes of the issue in this case. discussion as to the propriety of considering the applicability of Section 241(f) waiver would be meaningless and inappropriate. Furthermore, this record, in its present posture simply does not warrant such excursion.

Finally we are not unaware of the appealing features regarding the respondent's wife and United States citizen child, both of whom are residents of the United States. We further note that the respondent's parents and all his brothers and sisters are residents of the United States. These equities, however, cannot in any way be a factor in the disposition of the case, for, as stated above, he is ineligible for a waiver under Section 211(c) of the Act.

For the above reasons we will affirm the opinion of the Special Inquiry Officer.

ORDER: It is ordered that no change be made in the decision of the Special Inquiry Officer which has been certified to this Board for review.

/s/ Thos. G. Finucane
Chairman

[fol. 13]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,282

[File Endorsement Omitted]

GIUSEPPE ERRICO, PETITIONER

vs.

UNITED STATES DEPARTMENT OF JUSTICE, Immigration and Naturalization Service, RESPONDENT

PETITION FOR REVIEW—Filed May 7, 1964

Comes now Petitioner, Giuseppe Errico, by Frank Ierulli and Gerald H. Robinson, his attorneys, and for his Petition for Review, states as follows:

I

That this Court has jurisdiction of this cause by authority of Section 106 of the Immigration and Nationality Act, being an Act of Congress of September 26, 1961, Public Law 87-301, Section 5 (a) 75 Stat. 651.

II

That Petitioner is a national of Italy, residing within the territorial boundaries of this Court, namely at Portland, Oregon.

III

The Petitioner entered the United States pursuant to an Immigrant Visa on October 17, 1959, and ever since that time has been a resident of the United States of America.

IV

That the Respondent has required the Petitioner herein [fol. 14] to show cause why he should not be deported

pursuant to the Immigration and Nationality Act, Sections 241(a)(1) and Section 211(a)(4), and the said Respondent has ruled that the Petitioner is excludable and deportable thereunder, by virtue of a decision of the Special Inquiry Officer dated January 31, 1964, which opinion was affirmed by the Board of Immigration Appeals dated April 20, 1964.

V

That by virtue of said decisions, the Respondent has threatened to forthwith deport the Petitioner from the United States of America and return him to Italy.

VI

That the foregoing decision of the Special Inquiry Officer and the Board of Immigration Appeals is illegal and contravenes the Statutes of the United States of America in such cases made, and the threatened deportation of the Petitioner to Italy is illegal and not authorized by law, in that Petitioner is entitled to relief under Section 241(f) of the Immigration and Nationality Act, 8 USCA 1251(f).

VII

Petitioner's wife is a resident legally admitted to the United States, and his son is a native-born citizen of the United States, and all of Petitioner's brothers and sisters are residents of the United States.

VIII

That Petitioner has exhausted his administrative remedies.

WHEREFORE, your Petitioner prays for a Decree of this Court as follows:

[fol. 15] 1. Ruling that Petitioner is entitled to the benefits of Section 241(f) of the Immigration and Nationality Act and that he is not excludable or deportable.

2. That the Respondent be restrained and enjoined from deporting the Petitioner to Italy or to any other place.

3. And for such other and further relief as may seem just and equitable in the premises.

/s/ GERALD H. ROBINSON
FRANK IERULLI and
GERALD H. ROBINSON
Attorneys for Petitioner

[Proof of service (omitted in printing)]

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,282

GIUSEPPE ERRICO, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Before: MERRILL, DUNIWAY, and ELY, Circuit Judges

OPINION—July 9, 1965

ELY, Circuit Judge:

Petitioner, now thirty-one years of age, emigrated from his native Italy and, with his wife, gained admission to the United States on October 17, 1959. His parents and all of his brothers and sisters reside in this country, and his son, an American citizen, was born here on August 3, 1960. He was admitted as a selected immigrant under the first preference of the Italian immigration quota. The status was approved under the authority of Section 203 (a) (1) (A) of the Immigration and Nationality Act (8 U.S.C. 1153 (a) (1) (A)). The visa petition had been submitted by a motor company of Portland, Oregon, and was supported by representations, in the form of affidavits originating in Italy, that the petitioner was a specialized mechanic and motor tune-up man on motors of Italian manufacture. Eight days after his arrival in New York City, the petitioner commenced his employment with the Portland motor company. The record reveals that he was given the assignment of performing work on German motors with tools which were strange to him. He remained in this employment for only three months, having failed, according to a finding of the Special Inquiry Officer, "to measure up to the requirements of a specialized mechanic." On August 29, 1960, [fol. 17] he entered the employ of Victory Plating Works,

Inc., of Portland, and he has remained continuously in such employment.

On September 11, 1963, the Immigration and Naturalization Service issued an Order to Show Cause and Notice of Hearing In Deportation Proceedings in which it was alleged that petitioner was "not a specialized mechanic and tune-up man as alleged. And on the basis of the foregoing * * *, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

> Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are not of the proper status under the quota specified in the immigrant visa, under Section 211 (a)(4) of the Act."

A hearing followed, and while it was shown that before he left Italy, and in anticipation of his prospective employment in the United States, the petitioner worked for a few months as an unpaid apprentice in an Italian garage, there was ample evidence to support a finding by the Special Inquiry Officer that the petitioner, at the time of his entry into the United States, was not a qualified automobile mechanic or a specialist in motors of Italian manufacture.

The petitioner sought relief from deportation under the provisions of Section 211(c) and (d) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1181(c)(d)), which provide, in effect, that the Attorney General may, in his discretion, grant relief to an inadmissible alien "if satisfied that such inadmissibility was not known and could not have been ascertained by the exercise of reasonable diligence by such immigrant" prior to his entry to the United States. The petitioner's application for this relief was denied upon the ground that the petitioner knew of his lack of qualifications prior to his departure from Italy and consequently could not qualify for favorable discretionary action under the provisions of Section 211(c). It is our opinion that the Special Inquiry Officer

properly applied Section 211(c) and that the denial of relief under this Section, affirmed by the Board of Immigration Appeals, was correct.

[fol. 18] In all stages of the proceedings, the petitioner has insisted that he is saved from deportation by Section 241(f), Immigration and Nationality Act (8 U.S.C. 1251 (f)), which provides:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens *who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation* shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence." (Emphasis added)

It is important to note that the italicized language has been adopted from Section 212(a)(19) (8 U.S.C. 1182 (a)(19)), one of many sections designating classes of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States:". We have seen that the petitioner is a parent of a United States citizen and the child of aliens lawfully admitted for permanent residence. It is also established that the petitioner procured "visas or other documentation, or entry into the United States by fraud or misrepresentation." Against the petitioner, it has been contended that in the Order to Show Cause, he was not charged with being inadmissible because of the provisions of Section 211(a)(19) relating to aliens who have gained entry by fraud or misrepresentation, but with inadmissibility under the provisions of Section 211(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1181(a)(4)) which reads:

> "(a) No immigrant shall be admitted into the United States unless at the time of application for admission he * * * (4) is of the proper status under the quota specified in the immigrant visa, * * *".

This contention, carefully considered by the Special Inquiry Officer, was correctly treated in his decision as follows:

> "The respondent has established the necessary relationship to come within the provisions of Section 241(f). Several questions, however, remain. The first, whether the provisions of Section 241(f) would apply to his case because he is charged with inad-
> [fol. 19] missibility under the provisions of Section 211 (a)(4) of the Immigration and Nationality Act relating to aliens who at entry were not of the proper status specified in the immigrant visa, rather than under Section 212(a)(19), aliens who procured a visa by fraud or willfully misrepresentating a material fact. The Board of Immigration Appeals, in the *Matter of K—*, I & N Dec. 585, 589, March 9, 1962, reaffirmed the previous order in *Matter of S-*, 7 I & N Dec. 715, holding that the section of law under which the deportation charge is laid is immaterial. The Board, in *Matter of K—*, stated: 'There are, however, other provisions of Section 241(a) which render an alien deportable after entry on charges which flow directly from the entry by fraud or misrepresentation. The two charges set forth in Section 241(a)(2) come within this category. Since Section 241(f) described in *general terms* aliens whose documentation or entry was procured by fraud or misrepresentation, we are of the opinion that it was the intent of Congress to save from deportation those aliens who were admissible except for the fact that they had made fraudulent statements regardless of the provision of the statute under which their deportation is sought.'
>
> It is concluded that the fact that the charge, excludable at entry for fraud or misrepresentation, is not urged, would not disqualify the respondent from the benefits of Section 241(f)."

It would therefore appear that petitioner, as an alien who "procured a visa or other documentation or entry into the United States by fraud or misrepresentation" and

"who is the * * * parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence", is saved from deportation by the provisions of Section 241(f) (8 U.S.C. 1251(f)) if he was "otherwise admissible" at the time of his entry. The Special Inquiry Officer concluded that since this issue of statutory construction "presents a novel question not decided by the Board", it would be "certified to the Board of Immigration Appeals for review and final decision". The Board held that since the petitioner's application for discretionary relief by waiver under Section 211(c) was not granted, he could not be "otherwise admissible at [fol. 20] the time of entry" and that "Section 241(f) of the Immigration and Nationality Act has no applicability to this case and need not have been discussed".

We disagree with the Board. Fair interpretation of the legislative history of the Section, its terms, and its relation to other statutes *in pari materia* lead to the conclusion that it is operative to spare the petitioner from deportation. Under its plain terms, the Section purports to grant absolute relief to aliens who have close familial ties in the United States and who have gained entry into the United States through "fraud or misrepresentation". Its benefits are not made dependent upon the exercise of discretion by the Attorney General in the granting of a waiver or in any other manner. It was enacted on September 26, 1961 and modified the terms of a portion of a statute, simultaneously repealed, which contained similar provisions. This previously existing statute, Pub. L. 85-316, 71 Stat. 640, 8 U.S.C. 1251a (not 1251(a)) was enacted in 1957. Upon its repeal, a portion of it was incorporated into Section 1182 of Title 8 as Section (h). This portion conferred upon the Attorney General the discretionary power to consent to the admission to the United States of certain aliens upon certain conditions, in general, as follows: (1) Aliens with certain close relatives already in the United States (2) whose exclusion would result in extreme hardship to the relatives residing in the United States (3) whose admission to the United States would not be contrary to the national welfare, safety, or security and (4) who were excludable from the United States under paragraphs (9), (10), or (12) of Section

212(a) of the Immigration and Nationality Act (8 U.S.C. 1182). Paragraphs (9), (10), and (12) define three classes of excludable aliens, those who have been convicted of a crime involving moral turpitude, those who have been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more, and those who are concerned with traffic in prostitution. Subsection (i) of Section 212, Immigration and Nationality Act (8 U.S.C. 1182(i)), by its present terms, also grants to the Attorney General certain discretionary powers with reference to the admission of an alien who has close relatives in the United States and who has sought to procure or has procured entry documentation by fraud or misrepresentation.

[fol. 21] Section 7 of the 1957 Act, repealed in 1961 was the near predecessor of the presently existing Section 241(f) (8 U.S.C. 1251(f)). It saved from deportation aliens with close relatives in the United States and who had gained entry because of limited misrepresentations with respect to nationality, place of birth, identity, or residence. The Section, however, expressly conditioned the granting of relief upon the consent of the Attorney General and the fact that the alien's misrepresentations were induced by his fear of persecution because of race, religion, or politics. Its legislative history reveals the congressional intent to apply "fair humanitarian standards." See 1952 U.S.C. Cong. and Adm.News, p. 1753, Besterman, Commentary on the Immigration and Nationality Act, 8 U.S.C.A., page 1. A comparison with the provisions of Section 7 of the 1957 Act with those of the successor Act, Section 241(f), reveals the following: (1) The prescribed United States relatives of the alien are the same, namely, "spouse, parent or a child of a United States citizen or of an alien lawfully admitted for permanent residence". (2) The former Act described misrepresentations as to only four facts to which it was obviously aimed, namely, nationality, place of birth, identity, or residence, whereas, the present Section 241(f) contains no limitation as to the type or nature of the fraud or misrepresentation which the alien may have perpetrated or made. (3) The former Section

conditioned relief upon the discretion of the Attorney General, favorably exercised in favor of the alien, whereas, in the present Section 241(f), there is no provision which conditions its operation upon the exercise of discretionary powers.

The present Section 241(f) is now the last paragraph of the Section which defines classes of deportable aliens and described as the first class, "aliens excludable by the law existing at the time of such entry". Section 241(a)(1), Immigration and Nationality Act (8 U.S.C. 1251). The determination of who are "excludable by the law" requires reference to Section 212, Immigration and Nationality Act (8 U.S.C. 1182). There, many classes are defined as excludable, including those defined in Sections (9), (10), and (12), to which we have already made reference and for whom discretionary relief is expressly made available. In the light of the long course of legislative history indicating a congressional intent to [fol. 22] apply "fair humanitarian standards", it is not reasonable to believe that Congress, by its enactments and reenactments in 1961, intended thereby to deny relief under the repealed Section 7 to an alien who had gained entry by misrepresenting his nationality, place of birth, identity, or residence and at the same time expressly provide for relief to three specific classes of aliens, those convicted of a crime involving moral turpitude, those engaged in the traffic of prostitution, and those who were ex-convicts upon whom at least five years of confinement had been actually imposed. To us, it seems more reasonable that Congress recognized the unyielding nature of the temptation which might impel an alien to make false misrepresentations above and beyond those pertaining to nationality, place of birth, identity, or residence in the hope of residing in proximity to dear ones already resident in the United States. Furthermore, it is entirely reasonable, in view of the broadening liberalization of the terms of the former Section 7 and the elimination of the provision relating to discretion, to assume that the absolute relief conferred by the statute would save from deportation such aliens who procure their documents of entry by fraud, either because their near relatives

already resided in the United States or because, after entry, they were not sought to be deported until after the passage of time and the establishment of intimate familial relationships with citizens of the United States. Perhaps it was sought to encourage responsible officials to scrutinize, with greater care and in advance of entry, representations made by the alien and others in support of immigrant visa applications.

In its brief in our court, and in oral argument, the Immigration Service has taken the position that the petitioner cannot be "otherwise admissible" under the provisions of Section 241(f) and thereby entitled to relief unless at the same time of his admission under the visa obtained by fraud he was also independently admissible under a different status or a different quota. This would lead to the conclusion that Section 241(f) could never be operative unless the alien, while entitled to a visa of unquestionable validity, had nevertheless fraudulently procured another upon which to base his admission. We cannot believe that Congress concerned itself with study and enactment of a statute which would grant relief only to one, if one can be imagined, who would seek to obtain [fol. 23] and would obtain an immigrant visa by recourse to fraud when he already had or would obtain a separate and valid visa and, if the Immigration Service had issued the two documents, would select for presentation and entry the spurious of the two. Such an interpretation of Section 241(f) would, in our judgment, strip it of all substantial meaning and purpose.[1]

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[1] The Board of Immigration Appeals in Matter of Slade, I&N., A-10296218 (Nov. 30, 1962), has disagreed. It points to two hypothetical situations in which it sees that Section 241(f) may operate to the alien's benefit. These are seen in the Board's comments as follows:

> "Does our conclusion make section 241(f) of the Act meaningless as counsel contends? We think not. A person deportable as having obtained a visa by fraud is barred from the United States. In the absence of legislation such as that contained in section 241(f) of the Act there could be no waiver of this perpetual bar to the acquisition of lawful permanent residence in the United States even though ties with United States

The foregoing considerations lead to the conclusion that the petitioner was not, at the time of his entry, inadmissible by reason of falling within one of the excludable classes defined in Section 212 (8 U.S.C. 1182); hence, he [fol. 24] was, except for the fraud for which he is forgiven under the terms of Section 241(f), "otherwise admissible". He does not fall within the excludable class defined in paragraph (20) of Section 212 [2] because of the paragraph's prefatory exception clause. It may be said that our conclusion may encourage aliens to seek entry to our country by fraudulent means and then, with all haste, to establish or create relationships with American citizens. This may well be true, but our only obligation is to reach and apply the most reasonable construction of the

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citizens or legally resident aliens existed. Section 241(f) of the Act is also effective to require termination of deportation proceedings where an alien willfully misrepresented a matter which did not make her inadmissible but which was nevertheless material; i.e., a misrepresentation concerning name, existence of a conviction of a crime which did not involve moral turpitude, etc. (see, *Matter of S— and B—C—*, Int. Dec. 1168)."

In our view, the Board's opinion is fallacious. In the first assumed situation, it overlooked Subsection (i) of Section 212 (8 U.S.C. 1182 (i)), added by amendment on September 26, 1961, which, apart from Section 241(f), grants discretionary power to the Attorney General to waive "this perpetual bar to the acquisition of lawful permanent residence in the United States * * * ". As to the second situation, "termination of deportation proceedings" would be required even though the provisions of Section 241(f) did not exist. See *Duran-Garcia* v. *Neelly*, 246 F.2d 287, 291, (5th Cir. 1957); *Herrera-Roca* v. *Barber*, 150 F. Supp. 492 (N.D. Cal. 1957); *In re Field's Petition*, 159 F.Supp. 144 (S.D.N.Y. 1958). Moreover, it appears quite obvious that the language of Section 241(f) was not drafted for the purpose of requiring the "termination of deportation proceedings" against an alien guilty of a misrepresentation as to "a matter which did not make her inadmissible * * * ".

[2] "Except as otherwise specifically provided in this chapter, any immigraant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(e) of this title;"

statute.[3] In this construction, it is not our duty to weigh all considerations of national policy, humanitarian or otherwise.

The Order of Deportation is vacated.

[fol. 25] CONCURRING OPINION

DUNIWAY, Circuit Judge:

I concur in the foregoing opinion. I would add that the sole ground upon which it is here asserted that section 241(f) does not apply is that Errico was not "otherwise admissible" within the meaning of that subsection, because, but for the misrepresentation, he was not of the proper status under the quota specified in the visa. I note, however, that section 211(a) under which it is sought to deport him, contains five qualifications for admission, which are as follows:

> "(1) . . . a valid unexpired immigrant visa . . .,
> (2) is properly chargeable to the quota specified in the immigrant visa,
> (3) is a non-quota immigrant if specified as such in the immigrant visa,
> (4) is of the proper status under the quota specified in the immigrant visa, and
> (5) is *otherwise admissible* under this chapter." (Emphasis added)

It will be noted that here the phrase "otherwise admissible" refers to matters other than matters of quota status. Section 241(f) is *in pari materia* with section 211(a), and I think it can reasonably be said that the phrase "otherwise admissible" in section 241(f) also refers to disqualifications other than those relating to the

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[3] Even if there is reasonable doubt as to the proper interpretation of Section 241(f), the doubt must be resolved in favor of the alien. *Fong How Tan* v. *Phelan*, 333 U.S. 6, 63 S.Ct. 374, 92 L.Ed 433 (1948); *Barber* v. *Gonzales*, 347 U.S. 637, 74 S.Ct. 822, 98 L.Ed. 1009 (1954); *Garcia-Gonzales* v. *Immigration and Naturalization Service*, —— F.2d —— (9th Cir. 1965).

quota. This construction, as the opinion of my Brother Ely indicates, gives some effect to section 241(f). Otherwise, it appears, as his opinion shows, section 241(f) could hardly ever, and perhaps never, be operative.

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,282

GIUSEPPE ERRICO, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

JUDGMENT—July 9, 1965

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is vacated.

Filed and entered: July 9, 1965.

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEFORE: MERRILL, DUNIWAY AND ELY, Circuit Judges

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—August 14, 1965

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellee filed August 9, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 28]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 29]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

vs.

GIUSEPPE ERRICO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 31, 1965

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 11, 1966.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

[fol. 30]

SUPREME COURT OF THE UNITED STATES

No. 898, October Term, 1965

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

GIUSEPPE ERRICO

ORDER ALLOWING CERTIORARI—March 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 215507 767